

1992

State of Utah v. Kerry B. Baker : Brief of Appellant

Utah Court of Appeals

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R. Paul Van Dam; Attorney General; Attorneys for Respondent.

Bernard L. Allen; Public Defender Association; Attorney for Appellant.

Recommended Citation

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BRIEF

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DOCKET NO. 920550 IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Respondent,	:	Case No. 920550-CA
vs.	:	
KERRY B. BAKER,	:	
Defendant/Appellant.	:	

BRIEF OF APPELLANT

Appeal from the Second Judicial District Court's
acceptance of Defendant's guilty plea entered to
the offense of Third Degree Felony Theft, UCA
Section 76-6-410 on the 8th day of July, 1992

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Salt Lake City, Utah 84114

BERNARD L. ALLEN #0039 of
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FILED

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COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

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Plaintiff/Respondent,	:	Case No. 920550-CA
vs.	:	
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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
	:	BRIEF OF APPELLANT
Plaintiff/Respondent	:	
vs.	:	Appeal No. 920550-CA
KERRY B. BAKER,	:	
	:	Category
Defendant/Appellant.	:	

JURISDICTION AND NATURE OF PROCEEDINGS

Jurisdiction is conferred upon this case pursuant to UCA Annotated 78-2-2(3)(i) and Rule 26 of the Utah Rules of Criminal Procedure.

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS

Utah Code Annotated 76-6-410, Theft by Gross Deviation of a Rental Agreement.

STATEMENT OF THE ISSUES PRESENTED ON APPEAL

1. Whether the Defendant's plea was entered in this case knowingly and voluntarily by the Defendant.

PROCEDURAL HISTORY OF THE CASE

This is an appeal from the Second Judicial District Court's acceptance of Defendant's guilty plea entered to the offense of Third Degree Felony Theft, UCA Section 76-6-410 on the 8th day of July, 1992.

Kerry Baker was arraigned in the Second Circuit Court of Weber County on the 18th day of June, 1992 for the offenses of Theft by Gross Deviation of a Rental Agreement, a Third Degree Felony, Theft

by Gross Deviation of a Rental Agreement, a Class A Misdemeanor, and Theft by Gross Deviation of a Rental Agreement, a Class B Misdemeanor.

At the Arraignment the Defendant was interviewed by the Public Defender's Office and found to qualify for their services. A Preliminary Hearing was scheduled for the 26th day of June, 1992.

At the Preliminary Hearing the defense counsel and Defendant had an opportunity to review the evidence that would be presented by the State, including interviewing the witnesses present for that hearing. At that time the Defendant determined to waive the Preliminary Hearing and a negotiation was made with the State of Utah that the Defendant would enter a plea of guilty to the Third Degree Felony and the other two (2) cases would be dismissed.

On the 8th day of July, 1992 the Defendant appeared in the Second Judicial District Court before the Honorable Judge Parley Baldwin and at that time was again arraigned on the charge of Theft by Gross Deviation of a Rental Agreement, a Third Degree Felony.

The Court was advised that the Defendant would be entering a guilty plea and the Court reviewed in detail the Defendant's rights and indicated that a plea entered at that time would waive those rights.

The Defendant also reviewed a Statement by Defendant in Advance of a Plea read to him by Attorney Martin Gravis and Defendant signed the same indicating that he had it read to him and understood its contents.

A plea of guilty was entered and sentencing was set for the 29th day of July, 1992. At the time of sentencing the Defendant was sentenced to serve a term in the Utah State Prison from 0-5 years and to pay restitution in the amount of \$641.14 for the offenses.

This is an appeal of Defendant's conviction and prison sentence and is based upon Defendant's allegations that he entered the plea under a promise from defense counsel, Bernard L. Allen, that he would not go to Prison and would only serve jail time with work release.

STATEMENT OF FACTS

On the 4th day of December, 1990 the Defendant entered into an agreement with Action Rental whereupon the Defendant agreed to rent a tv, bed and headboard and chest for the respective monthly rental fees of \$50.06, \$43.39 and \$11.13 per month.

At that time the Defendant signed Rental Agreements on each of the three (3) items agreeing to make said payments and further agreed by initially the block that he would not dispose of the property through sale or through pawning the items rented.

The Defendant further contracted that he would allow the property removed from the location known by Action Rental. (See copies of Rental Agreement attached hereto as Exhibit "A" and made a part hereof by reference.)

According to the proprietor of the Action Rental store wherein this Contract was entered, Mr. Baker was sporadic in making the agreed upon rental payments and that finally some time after May of

1991 the representative of Action Rental appeared for the purpose of recovering the items rented.

Action Rental was able to recover other items that were rented on the same day, but the tv, bed and headboard and chest were not to be seen. According to the agent of Action Rental, Geoff Scott, Mr. Baker indicated to him that the property had been sold and was no longer available to Action Rental.

Apparently further efforts were made by Action Rental to recover the money for these items of property, however, these efforts were unsuccessful and Informations were filed against the Defendant as indicated above on approximately October 22, 1991.

The Defendant was taken into custody on or about the 16th day of June, 1992 whereupon he was appointed counsel due to his indigence and Preliminary Hearing was scheduled for the 26th day of June, 1992.

At the Preliminary Hearing Attorney Bernard L. Allen represented the Defendant and had an opportunity to review with the Defendant the statements made by witnesses in the police reports and to discuss with the witnesses their affirmation of those statements. Defense counsel and Defendant were aware of Defendant's previous criminal record which included a prior prison conviction and the fact that the Defendant was currently on parole out of the State of Washington, although counsel had been notified that the State of Washington was no longer interested in having Mr. Baker return to their jurisdiction.

Arrangements for the entry of a guilty plea to the Third Degree Felony were made and the hearing was set for Arraignment in the District Court on the 8th day of July, 1992. Attorney Allen prepared the appropriate Statement by Defendant in Advance of Plea to be used as the entry of plea, but because of other required Court appearances was not present at the Arraignment of the Defendant.

Mr. Baker was represented by Attorney Martin Gravis, who pursuant to the notes prepared by Attorney Allen, proceeded to review with the Defendant all his rights pursuant to a Statement by Defendant in Advance of Plea, which explains to Defendant all constitutional rights, including under Paragraph 10 "no agreements have been reached, nor representations have been made to me as to what the sentence will be" and under Paragraph 11 which refers to the possible maximum sentence imposed upon a guilty plea, which in this case was 0-5 years in prison.

In a second portion of the Agreement, the Defendant agrees under Paragraph 2 that "no threats or promises of any sort have been made to me to induce me or to dissuade me to enter this plea" and under Paragraph 3 "no one has told me that I would receive probation or any other form of leniency because of my plea".

Prior to presenting his guilty plea to the Court Judge Baldwin reviewed with Mr. Baker his constitutional rights, including his review of the Statement by Defendant in Advance of Plea and asked (Tp. 4, line 8)

The Court: O.K., but you have gone through the Plea Agreement with Mr. Gravis?

Mr. Baker: Yes.

The Court: And you understand that.

Judge Baldwin reviewed with the Defendant the elements of the offense and Mr. Baker indicated that he understood the elements that would have to be proven beyond a reasonable doubt. (Tp. 6, line 15)

The Court also asked the Defendant regarding any outside promises made to him by anyone. (Tp. 8, line 4-21)

The Court: Have any promises been made to you?

Mr. Baker: No.

The Court: Mr. Baker?

Mr. Baker: No.

The Court: Are you doing this voluntarily without any duress from anyone?

Mr. Baker: Yes.

The Court: Do you understand that any agreements that may have been represented are not binding on this Court in terms of sentencing? You understand that?

Mr. Baker: Yes.

The Court: Are there any questions that you want to ask?

Mr. Baker: No.

The Court: Are you in fact guilty of what you have been charged with?

Mr. Baker: Yes.

The Court accepted the plea after ascertaining that the Defendant was certain of his constitutional rights and aware that he was waiving those rights by entering a plea and making an attempt to ascertain that the plea was entered voluntarily and knowingly. The Class A and Class B Misdemeanors were also dismissed at that time.

Defendant was referred to the Probation Department for a Presentence Report and Sentencing was scheduled for the 29th day of July, 1992. At the time of sentencing on the 29th day of July, 1992, the Defendant was again represented by Attorney Martin Gravis who was with the Defendant at the time of plea was entered.

Mr. Baker, through Attorney Gravis, first stated his intention to wait for Attorney Allen to be present for sentencing, however, in open Court Mr. Baker indicated that it was acceptable to him to have Mr. Gravis handle the sentencing hearing. (Tp. 11, line 12)

The Presentence Report was not favorable due to Mr. Baker's prior criminal record, which included a term in Prison and the fact that Defendant had on numerous occasions, violated his probation agreements in the past. (Tp. 12, line 7, 24, Tp. 13, line 3)

At the time set for sentencing, Mr. Baker, for the first time brought up the assertion that his attorney had promised that he would not serve prison time as a result of his guilty plea.

Mr. Baker: "Well, Bernie Allen promised me one thing, he told me I ain't going to Prison. That he would try to get me a work release and do some jail time. If I do---well, go to Prison, or a

lot of jail time, I ain't payin' no restitution, you know. I did time for it."

Defendant was in fact sentenced to a term in the Utah State Prison not to exceed five (5) years and was ordered to pay restitution in the amount of \$641.14.

SUMMARY OF THE ARGUMENT

POINT I

THE TRIAL COURT ERRED BY NOT FULLY COMPLYING WITH THE REQUIREMENTS OF RULE 11 AND BY FAILING TO ASCERTAIN A FACTUAL BASIS FOR SAID PLEA OF GUILTY.

The Trial Court's pre-plea inquiry did not comply with the requirements of Rule 11(5)(g) as the Defendant was not advised of the thirty (30) day limitation for his filing of a Motion to Withdraw the Plea. The Court also failed to extract from the Defendant or his counsel the factual basis for the entry of said guilty plea.

POINT II

THE DEFENDANT'S PLEA WAS MADE UNDER IMPROPER INDUCEMENT FROM COUNSEL AND WAS THEREFORE NOT KNOWINGLY AND VOLUNTARILY ENTERED.

The Defendant's plea to the charge in the present case was not knowingly or voluntarily made due to the Defendant's assertion that he had been promised by defense counsel that his sentence to the charge would not include Prison, but only some jail time with potential work release. Such a guarantee, if made, would constitute undue influence or improper inducement and effectively remove the voluntary and knowing entry of Defendant's plea. Thus, the Defendant's Fifth Amendment protection against self

incrimination and due process protection afforded by the U.S. Constitution as well as Article I, Section 7 and 12 of the Utah Constitution have been violated.

ARGUMENT

POINT I

The United States Constitution under the Fifth Amendment and as applied to the various states by the Fourteenth Amendment provides that "No person. . .shall be compelled in any criminal case to be a witness against himself, nor be deprived of liberty without due process of law. . .".

The Utah Constitution under Article I, Section 5 also provides a criminal Defendant with due process protection before any deprivation of liberty can be imposed. Further, in Section 12, "Rights of Accused Person" include not being "compelled to give evidence against himself".

The Defendant, Kerry Baker, entered a plea of guilty to the charge of Theft, a 3rd Degree Felony. The proclamation of guilt was clearly an act of self-incrimination and as such his statement was an act protected by both the State and Federal Constitution as indicated above. It is therefore incumbent upon the Court in accepting such a guilty plea to clearly ascertain whether the incriminating plea in entered knowingly and voluntarily.

State v. Gardner, 230 P2d 559, (Utah) State v. Crank, 142 P2d 178, (Utah) and State v. Breckenridge, 688 P2d 440 (Utah).

Rule 11 of the Utah Rules of Criminal Procedures outline the minimum requirements that the Court must follow in accepting a

guilty plea. The case of State v. Smith, 812 P2d 470 (Utah) has held that

"A Trial Court's failure to comply strictly with this Rule in accepting a guilty or no contest plea is good cause as a matter of law for the withdrawal of that plea".

In the instant case, the Court did not strictly comply with Section 5(g) of Rule 11 as Judge Baldwin failed to advise the Defendant of his thirty (30) day limitation for filing a Motion to Withdraw the Plea. Although this limitation was made a part of the "Statement by Defendant in Advance of Plea", this has been held to be insufficient compliance with Rule 11(5).

State v. Gibbons, 740 P2d 1309 (Utah) and the case of State v. Valencia, 776 P2d 1332 (Utah) which emphatically declares that

"Strict, and not substantial, compliance with Subsection (5) is required".

The Court's failure to so inform the Defendant may have been the reason for the Defendant's failure to request a withdrawal of plea in this case.

The Court also failed to require that a factual basis be established in open Court to substantiate the appropriate and voluntary nature of Defendant's plea. The Smith case further requires that:

"In addition to providing a synopsis of the acts constituting the offense, a Trial Court, before accepting a guilty or no contest plea, should conduct a limited inquiry into the evidence proving those acts. However, that inquiry need go no further than is necessary to assure, as a matter of due process, that the plea represents a voluntary and

intelligent choice among the alternative courses of action open to the Defendant.

In the present case the record is devoid of any inquiry into the evidence and therefore, no factual basis for the plea is ever supplied. Without this inquiry according to the language in Smith, the Court can't assure that the plea is a voluntary and intelligent choice and further violates Defendant's due process protection. (See also State v. Maguire, 184 UAR 39 (1992).

POINT II

The Utah Court of Appeals in State v. Thorup, 200 UAR 67 (1992), although holding that the Defendant's plea was voluntary and knowingly and upholding the Trial Court's denial of Defendant's Motion to Withdraw his Plea also pointed out that

"The Trial Court's compliance with Rule 11 does not foreclose the possibility the Court abused its discretion in refusing Defendant's Motion is his plea was in fact voluntary."

In the Thorup case the Defendant had moved to set aside his guilty pleas claiming that his plea was entered under undue influence from his father and economic coercion from his attorney.

The Trial Court's ruling emphasized that the Defendant was a "middle aged college graduate with considerable exposure to the criminal procedures". The Court of Appeals agreed with the Trial Court that with this type of Defendant the examination of the Defendant by the Court prior to accepting the plea was fully adequate and did not warrant withdrawing the plea.

In the present case, however, the Defendant is not well educated and according to counsel's statements at plea, "He doesn't read very well." (Tp. 4 L. 7) As implied by the Court in the intelligence and capacity of the Defendant is an issue requiring that the pre-plea examination be particularly thorough and understandable.

The Utah Supreme Court in State v. Forsythe, 560 P2d 337 (Utah), as quoted in Thorup stated,

"We are in full agreement with the proposition that for a plea of guilty to be valid, it must appear that the accused had a clear understanding of the charge and without undue influence, coercion, or improper inducement voluntarily entered such a plea." (Id @ 338-339 emphasis added)

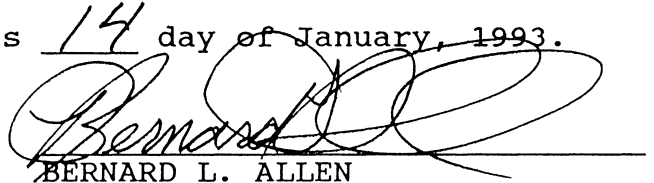
The Defendant stated at the time of sentencing that his attorney had promised him that he would not go to prison, but only jail with work release. Although the Defendant was silent regarding this at the time of plea and in fact stated to the contrary that no additional promises or inducements had been made, the Court would have to consider that if these assertions were believed that the Defendant was improperly induced into entering the plea of guilty in this case.

CONCLUSION

The Trial Court did not fully comply with the pre-plea inquiry requirements of Rule 11 and therefore failed to ensure that the Defendant's plea was voluntarily and knowingly entered and Defendant's assertion that he was improperly induced into entering this plea are a violation of Defendant's rights against self

incrimination and guarantee of due process as provided by both the Utah and United States Constitution. The Defendant's conviction should be overturned and the case remanded for Trial or further proceedings.

RESPECTFULLY SUBMITTED this 14 day of January, 1993.


BERNARD L. ALLEN
Attorney for Defendant

CERTIFICATE OF MAILING

I hereby certify that I mailed four (4) true and correct copies of the above and foregoing Appellant's Brief to counsel for the Plaintiff, Attorney General's Office, 236 State Capitol, Salt Lake City, Utah 84114, postage prepaid this 14 day of January, 1993.



"APPENDIX"

STATE OF UTAH vs. KERRY B. BAKER
Affidavit of Impecuniosity
Case No. 921900334

PUBLIC DEFENDER ASSOCIATION, INC.,
OF WEBER COUNTY
2568 Washington Blvd., Suite 203
Ogden, UT 84401
Telephone: (801) 392-8247

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
WEBER COUNTY, STATE OF UTAH

STATE OF UTAH,	:	
	:	STATEMENT OF DEFENDANT IN
Plaintiff,	:	ADVANCE OF PLEA OF GUILTY
	:	
vs.	:	
	:	
KERRY B. BAKER,	:	Case No.
	:	Judge DAVID E. ROTH
Defendant.	:	

I hereby acknowledge and certify that I have been advised of the following facts and rights by my attorney, that I understand said facts and rights, and that I have had the assistance of counsel in reviewing, explaining and completing this form:

1. The nature of the charges against me have been explained. I have had an opportunity to discuss the nature of the charges with my attorney, and I understand the charges and the elements of each charge which the government is required to prove.

STATE OF UTAH vs. KERRY B. BAKER
Affidavit of Impecuniosity
Case No. 921900334

2. As explained, I am charged with crimes in Weber County as follows:

<u>Crime</u>	<u>Class or Degree</u>	<u>Statutory Penalty</u>
Theft by Rental Agreement	3rd-Degree Felony	0-5 years U.S.P. &/or \$5,000.00 fine.
Theft	Class "A" Misdemeanor	up to one year jail \$2,500.00 fine.
Theft	Class "B" Misdemeanor	0-6 months jail &/or \$1,000.00 fine.

3. The possibility of entering a plea of guilty to the charges has been discussed with the prosecutor as follows:

<u>Crime</u>	<u>Class or Degree</u>	<u>Statutory Penalty</u>
Theft by Rental Agreement	3rd-degree Felony	0-5 years U.S.P. &/or \$5,000.00 fine.

4. I understand that the elements of the offenses I am pleading guilty to are: That I exercised unauthorized control over the property of another by grossly deviating from the agreed upon terms of my rental agreement which resulted in the owners being deprived of said property.

5. I know that I can be represented by an attorney at every stage of the proceeding, and I know that if I cannot afford an attorney, one will be appointed to represent me.

6. I know that I have a right to plead "not guilty," and I know that if I do plead "not guilty," I can persist in that plea.

STATE OF UTAH vs. KERRY B. BAKER
Affidavit of Impecuniosity
Case No. 921900334

7. I know that I have a right to a trial by jury, and that if I were to stand trial by a jury:

a. I have a right to the assistance of counsel at every stage of the proceeding.

b. I have a right to see and observe the witnesses who testify against me.

c. My attorney can cross-examine all witnesses who testify against me.

d. I can call such witnesses as I desire, and I can obtain subpoenas to require the attendance and testimony of those witnesses. If I cannot afford to pay the witness and mileage fees of those witnesses, the government will pay them.

e. I cannot be forced to incriminate myself and I do not have to testify at any trial.

f. If I do not want to testify, the jury will be told that no inference adverse to me may be drawn from my failure to testify.

g. The government must prove each and every element of the offenses charged against me beyond a reasonable doubt.

h. A unanimous verdict of a jury is required to convict me.

i. If I were to be convicted, I can appeal, and if I cannot afford the cost of such an appeal, the government will pay the costs of the appeal including the services of appointed counsel.

8. Under a plea of guilty, there will not be a trial of any kind, and I am waiving my rights listed in the previous paragraph and admitting that I am guilty of the crime to which my plea of guilty is entered.

STATE OF UTAH vs. KERRY B. BAKER
Affidavit of Impecuniosity
Case No. 921900334

9. There is no appellate review of any lawful sentence imposed under a plea of guilty.

10. No agreements have been reached and no representations have been made to me as to what the sentence will be.

11. I know that under the laws of Utah, the possible maximum sentence that can and may be imposed upon my plea of guilty to the charge identified on page two of this agreement, are set out in paragraph three above. I also know that if I am on probation, parole or awaiting sentencing upon another offense for which I have been convicted or plead guilty, my plea in the present action may result in consecutive sentences being imposed upon me.

12. I know that under a plea of guilty, the judge may ask me questions about the offense to which the plea is entered.

13. The only plea agreement which has been entered into with the government is: Upon my plea of guilty to Theft a 3rd-Degree Felony the State agrees to dismiss the Theft "A" and Theft "B" both Misdemeanors.

14. I have a right to ask the Court any questions I wish to ask concerning my rights, or about these proceedings and the plea.

*

*

*

I make the following representations to the Court:

1. I am 33 years of age. My education consists of Sepecial Education years. I cannot read and understand English.

STATE OF UTAH vs. KERRY B. BAKER
Affidavit of Impecuniosity
Case No. 921900334

2. No threats or promises of any sort have been made to me to induce me or to persuade me to enter this plea.

3. No one has told me that I would receive probation or any other form of leniency because of my plea.

4. I understand that I may request to withdraw a plea of guilty within 30 days of entry of the plea, but if said request is not made within 30 days I forfeit this right. A motion to withdraw a plea of guilty will only be granted upon good cause and is within the discretion of the Court.

5. I have discussed this case and this plea with my lawyer as much as I wish to.

6. I am satisfied with my lawyer.

7. My decision to enter this plea was made after full and careful thought, with the advice of counsel, and with a full understanding of my rights, the facts and circumstances of the case and the consequences of the plea. I was not under the influence of any drugs, medication or intoxicants when the decision to enter the plea was made and I am not now under the influence of any drugs, medication or intoxicants.

8. I have no mental reservations concerning the plea.

DATED this 8th day of July, 1992.

/S/
DEFENDANT

STATE OF UTAH vs. KERRY B. BAKER
Affidavit of Impecuniosity
Case No. 921900334

I certify that I have discussed this statement with the Defendant; that I have fully explained his rights and believe that he is knowingly and voluntarily entering the plea with full knowledge of his legal rights and that there is a factual basis for the plea.

DATED this 8th day of July, 1992.

/S/
ATTORNEY FOR DEFENDANT

I certify that I have reviewed the Statement of the Defendant in Advance of Plea of Guilty and that said statement correctly reflects the plea negotiations of the parties.

DATED this 8th day of July, 1992.

/S/
DEPUTY WEBER COUNTY ATTORNEY

STATE OF UTAH vs. KERRY B. BAKER
Affidavit of Impecuniosity
Case No. 921900334


O R D E R

The signature of the Defendant was acknowledged in the presence of the undersigned Judge.

Based upon the facts set forth in the foregoing Statement by Defendant in Advance of Plea of Guilty, the court finds the Defendant's plea of guilty is freely and voluntarily made and it is ordered that Defendant's plea of "guilty" to the charge(s) set forth in the agreement be accepted and entered.

DONE in Court this ____ day of July, 1992.

BY THE COURT:



DISTRICT COURT JUDGE

021191

IN THE DISTRICT COURT OF WEBER COUNTY, STATE OF UTAH
State of Utah, vs. BAKER, KERRY B
Defendant.
JUL 31 AM 9 15
JUDGMENT, SENTENCE, AND
COMMITMENT TO UTAH STATE
PRISON
No. 921900334
JUL 31 1992
--00000--

Defendant having been convicted by ☐ a jury; ☐ the court; ☒ plea of guilty;
☐ plea of no contest; of the offense of THEFT BY RENTAL AGREEMENT, a
felony of the 3rd degree, being now present in court and ready for sentence,
is now adjudicated guilty of the above offense and is now sentenced as follows:

Judge's
initials

THE BASIC SENTENCE

- AKB ☒ not to exceed five (5) years at the Utah State Prison;
☐ not less than one (1) year nor more than fifteen (15) years at Utah State Prison;
☐ not less than five (5) years and which may be for life at Utah State Prison;
☐ to pay fine in the amount of \$_____.

ENHANCED PUNISHMENT FOR FIREARM USE

Defendant is additionally sentenced as follows:

- ☐ one (1) year at Utah State Prison, pursuant to 76-3-203(1), (2) or (3);
☐ not to exceed five (5) years at Utah State Prison pursuant to 76-3-203(1), (2) or (3);
☐ not less than five (5) years nor more than ten (10) years at Utah State Prison,
pursuant to 76-3-203(4);

said sentence to run consecutive to the basic sentence as set forth above.

HABITUAL CRIMINAL ALTERNATIVE PUNISHMENT

Upon a finding that the defendant is in the status of an habitual criminal, the
defendant is sentenced to:

- ☐ not less than five (5) years and which may be for life at Utah State Prison.

RESTITUTION

- AKB ☒ Defendant is ordered to pay restitution in the amount of \$641.14, to
ACTION T V

Defendant is remanded into custody of:

- AKB ☒ the Sheriff of this county, for delivery to the Warden or other appropriate
official at the Utah State Prison for execution of sentence; or
☐ the Warden for execution of this sentence.

DATED this 29th day of July, 19 92.

ATTEST, CLERK OF THE COURT

xxx COUNTY CLERK

DISTRICT JUDGE

DISTRICT COURT
WEBER COUNTY

02 AUG 21 PM 3 07

PUBLIC DEFENDER ASSOCIATION,
INC., OF WEBER COUNTY
BERNARD L. ALLEN (#0039)
2568 Washington Blvd., Suite 203
Ogden, UT 84401
Telephone: (801) 392-8247

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
WEBER COUNTY, STATE OF UTAH

STATE OF UTAH,	:	
	:	NOTICE OF APPEAL
Plaintiff/Respondent,	:	
vs.	:	AUG 21 1992
	:	Case No. 921900334
KERRY B. BAKER,	:	
	:	JUDGE David Roth
Defendant/Appellant.	:	

TO THE CLERK OF THE COURT AND THE ATTORNEY GENERAL:

NOTICE IS HEREBY GIVEN that KERRY B. BAKER,
Defendant/Appellant, hereby appeals from the judgment rendered in
this action, wherein the Defendant/Appellant was convicted of Theft
a 3rd-Degree Felony on July 29, 1992.

DATED this 21 day of August, 1992.



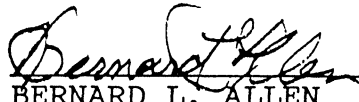
BERNARD L. ALLEN
Attorney for Defendant/Appellant

BERNARD L. ALLEN (#0039)
Attorney for Defendant
2568 Washington Blvd., Suite 203
Ogden, UT 84401
Telephone: (801) 392-8247

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	STIPULATION FOR ENLARGEMENT
	:	OF TIME TO FILE APPELLANT'S
Plaintiff/Respondent,	:	BRIEF
vs.	:	Case No. 920550-CA
KERRY B. BAKER,	:	
Defendant and Appellant.	:	

COMES NOW, Bernard L. Allen, Attorney for Defendant and hereby moves that pursuant to Rule 26(a), of the Utah Rules of Appellant Procedure (1985), and due to the fact that the Attorney Bernard L. Allen is in need of an additional thirty (30) days to complete Defendant's brief. That the Defendant/Appellant may have an enlargement of time in which to file Appellant's Brief from November 23, 1992, until December 23, 1992.


BERNARD L. ALLEN
Attorney for Appellant

~~The State stipulates that the appellant may have an enlargement of time in which to file his brief.~~ *does not object to appellant's request for an enlargement of time.*


ASSISTANT ATTORNEY GENERAL

John J. McManis
 John J. McManis
 U.S. District Court
 U.S. Court of Appeals

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Norman H. Jackson, Judge

AMENDMENT V**[Criminal actions — Provisions concerning — Due process of law and just compensation clauses.]**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI**[Rights of accused.]**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT VII**[Trial by jury in civil cases.]**

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

AMENDMENT VIII**[Bail — Punishment.]**

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

COLLATERAL REFERENCES

Utah Law Review. — The Mootness Question in Habeas Corpus Proceedings Where Petitioner Is Released Prior to Final Adjudication, 1969 Utah L. Rev. 265.

Habeas Corpus and the In-Service Conscientious Objector, 1969 Utah L. Rev. 328.

Post-Conviction Procedure Act: Limitation on Habeas Corpus?, 1969 Utah L. Rev. 595.

Am. Jur. 2d. — 39 Am. Jur. 2d Habeas Corpus §§ 5 to 7.

C.J.S. — 16A C.J.S. Constitutional Law § 472 et seq.; 39 C.J.S. Habeas Corpus § 5.

A.L.R. — Anticipatory relief in federal courts against state criminal prosecutions growing out of civil rights activities, 8 A.L.R.3d 301.

Key Numbers. — Constitutional Law ¶ 83(1), 121 to 123.

Sec. 6. [Right to bear arms.]

The individual right of the people to keep and bear arms for security and defense of self, family, others, property, or the state, as well as for other lawful purposes shall not be infringed; but nothing herein shall prevent the legislature from defining the lawful use of arms.

History: Const. 1896; L. 1984 (2nd S.S.), S.J.R. 3.

Compiler's Notes. — Laws 1983, Senate

Joint Resolution No. 2, proposing to amend this section, was repealed by Senate Joint Resolution No. 3, Laws 1984 (2nd S.S.), § 2.

NOTES TO DECISIONS

ANALYSIS

Prospective application.

Regulation of right to bear arms.

Prospective application.

The amendment to this provision by Laws 1984 (2nd S.S.), Senate Joint Resolution No. 3 is to be given prospective application only. State v. Wacek, 703 P.2d 296 (Utah 1985).

Regulation of right to bear arms.

This section gives sufficient authority for the legislature to forbid the possession of dangerous weapons by those who are not citizens, or who have been convicted of crimes, or who are addicted to drugs, or who are mentally incompetent. State v. Beorchia, 530 P.2d 813 (Utah 1974).

COLLATERAL REFERENCES

Utah Law Review. — The Individual Right to Bear Arms: An Illusory Public Pacifier?, 1986 Utah L. Rev. 751.

Am. Jur. 2d. — 79 Am. Jur. 2d Weapons and Firearms § 4.

C.J.S. — 16A C.J.S. Constitutional Law § 511; 94 C.J.S. Weapons § 2.

A.L.R. — Gun control laws, validity and construction of, 28 A.L.R.3d 845.

Validity of statute proscribing possession or carrying of knife, 47 A.L.R.4th 651.

Key Numbers. — Constitutional Law ¶ 8 Weapons ¶ 1, 3, 6 et seq.

Sec. 7. [Due process of law.]

No person shall be deprived of life, liberty or property, without due process of law.

History: Const. 1896.

Cross-References. — Eminent domain generally, § 78-34-1 et seq.

Workmen's Compensation Act is not invalid because it delegates to industrial commission the power to hear, consider and determine controversies between litigants as to ultimate liability, or their property rights. *Utah Fuel Co. v. Industrial Comm'n*, 57 Utah 246, 194 P. 122 (1920).

Dependents of employee killed by acts of third party, a stranger to employment, are not

limited to recovery under Workmen's Compensation Act exclusively, unless they have assigned their rights to insurance carrier. *Robinson v. Union Pac. R.R.*, 70 Utah 441, 261 P. 9 (1927).

¹ Cited in *Wrolstad v. Industrial Comm'n*, 786 P.2d 243 (Utah Ct. App. 1990).

COLLATERAL REFERENCES

Utah Law Review. — No-Fault Automobile Insurance in Utah — State Constitutional Issues, 1970 Utah L. Rev. 248.

Comment, The Defense of Entrapment: Next Move — Due Process? 1971 Utah L. Rev. 266.

Comment, The Scope of Fourteenth Amendment Due Process: Counsel in Prison Disciplinary Proceedings, 1971 Utah L. Rev. 275.

Comment, The Utah Supreme Court and the Utah State Constitution, 1986 Utah L. Rev. 319.

Outdoor Sports and Torts: An Analysis of Utah's Recreational Use Act, 1988 Utah L. Rev. 47.

Recent Developments in Utah Law — Judicial Decisions — Constitutional Law, 1990 Utah L. Rev. 129.

Am. Jur. 2d. — 16A Am. Jur. 2d Constitutional Law §§ 613 to 617.

C.J.S. — 16D C.J.S. Constitutional Law §§ 1428 to 1437.

A.L.R. — Exclusion of public from state

criminal trial in order to preserve confidentiality of undercover witness, 54 A.L.R.4th 1156.

Exclusion of public from state criminal trial in order to prevent disturbance by spectators or defendant, 55 A.L.R.4th 1170.

Exclusion of public from state criminal trial in order to avoid intimidation of witness, 55 A.L.R.4th 1196.

False light invasion of privacy—defenses and remedies, 57 A.L.R.4th 244.

Imputation of criminal, abnormal, or otherwise offensive sexual attitude or behavior as defamation—post-New York Times cases, 57 A.L.R.4th 404.

Libel or slander: defamation by statement made in jest, 57 A.L.R.4th 520.

Defamation: designation as scab, 65 A.L.R.4th 1000.

Intentional spoliation of evidence, interfering with prospective civil action, as actionable, 70 A.L.R.4th 984.

Key Numbers. — Constitutional Law ⇨ 322, 324, 327, 328.

Sec. 12. [Rights of accused persons.]

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

History: Const. 1896.

Cross-References. — Rights of defendants, statutory provisions, § 77-1-6.

Rule 11. Pleas.

(1) Upon arraignment, except for an infraction, a defendant shall be represented by counsel, unless the defendant waives counsel in open court. The defendant may not be required to plead until he has had a reasonable time to confer with counsel.

(2) A defendant may plead not guilty, guilty, no contest, not guilty by reason of insanity, or guilty and mentally ill. A defendant may plead in the alternative not guilty or not guilty by reason of insanity. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(3) A defendant may plead no contest only with the consent of the court.

(4) When a defendant enters a plea of not guilty, the case shall forthwith be set for trial. A defendant unable to make bail shall be given a preference for an early trial. In cases other than felonies the court shall advise the defendant, or his counsel, of the requirements for making a written demand for a jury trial.

(5) The court may refuse to accept a plea of guilty or no contest, and may not accept the plea until the court has found:

(a) if the defendant is not represented by counsel, he has knowingly waived his right to counsel and does not desire counsel;

(b) the plea is voluntarily made;

(c) the defendant knows he has rights against compulsory self-incrimination, to a jury trial, and to confront and cross-examine in open court the witnesses against him, and that by entering the plea he waives all of those rights;

(d) the defendant understands the nature and elements of the offense to which he is entering the plea; that upon trial the prosecution would have the burden of proving each of those elements beyond a reasonable doubt; and that the plea is an admission of all those elements;

(e) the defendant knows the minimum and maximum sentence that may be imposed upon him for each offense to which a plea is entered, including the possibility of the imposition of consecutive sentences;

(f) if the tendered plea is a result of a prior plea discussion and plea agreement, and if so, what agreement has been reached; and

(g) the defendant has been advised of the time limits for filing any motion to withdraw a plea of guilty or no contest.

(6) Failure to advise the defendant of the time limits for filing any motion to withdraw a plea of guilty or no contest is not a ground for setting the plea aside, but may be the ground for extending the time to make a motion under Section 77-13-6.

(7) (a) If it appears that the prosecuting attorney or any other party has agreed to request or recommend the acceptance of a plea to a lesser included offense, or the dismissal of other charges, the agreement shall be approved by the court.

(b) If sentencing recommendations are allowed by the court, the court shall advise the defendant personally that any recommendation as to sentence is not binding on the court.

(8) (a) The judge may not participate in plea discussions prior to any agreement being made by the prosecuting attorney.

1 THE COURT: Thank you. Then, Mr. Baker, I ask
2 you--first of all I want to know what your education is.

3 MR. BAKER: I went to sophomore.

4 THE COURT: Do you understand--read and
5 understand the English language?

6 MR. BAKER: I understand English, yes.

7 MR. GRAVIS: He doesn't read very well.

8 THE COURT: Okay. But you have gone through
9 the plea agreement with Mr. Gravis?

10 MR. BAKER: Yes.

11 THE COURT: And you understand that? You have
12 heard your attorney make statements as to what he--he is
13 telling me what you intend to do. Is there anything
14 misleading from what he has told me? Is that what you
15 intend to do?

16 MR. BAKER: Yes, sir.

17 THE COURT: Are you under the influence of any
18 alcohol or drug at this time?

19 MR. BAKER: No, sir.

20 THE COURT: Any other kind of health condition
21 that you may not be thinking too clearly?

22 MR. BAKER: No.

23 THE COURT: Are you presently receiving any
24 kind of medical treatment?

25 MR. BAKER: No--yeah.

1 MR. BAKER: Yes.

2 THE COURT: You understand that you would have
3 the right to confront the State's witnesses and call
4 witnesses that your attorney supplied, in the event he
5 felt best and you felt best, in your behalf. Do you
6 understand that?

7 MR. BAKER: Yes.

8 THE COURT: Do you understand that at the time
9 of trial that it would be the obligation of the State to
10 prove your guilt beyond a reasonable doubt of each of
11 the elements?

12 MR. BAKER: Yes.

13 THE COURT: You understand that?

14 MR. BAKER: Yes.

15 THE COURT: To be convicted of a third degree
16 felony, the theft, the prosecution would have to prove
17 that you had custody of a TV that was the property of
18 Action TV Rental. That it was a value of in excess of
19 \$250.00, but less than \$1,000.00. That pursuant to the
20 rental or lease agreement that it was not returned in
21 the specified time. And in so doing you intentionally
22 failed to comply with the terms of that agreement
23 concerning the return of that item. You understand that
24 each of those elements would have to be proven beyond a
25 reasonable doubt. Do you understand that?

1 there any additional talk you want to have with your
2 counsel?

3 MR. BAKER: No.

4 THE COURT: Have any promises been made to you?

5 MR. BAKER: No.

6 THE COURT: Mr. Baker?

7 MR. BAKER: No.

8 THE COURT: Are you doing this voluntarily,
9 without any duress from anyone?

10 MR. BAKER: Yes.

11 THE COURT: Do you understand that any
12 agreements that may have been represented are not
13 binding on this Court in terms of sentencing, you
14 understand that?

15 MR. BAKER: Yes.

16 THE COURT: Are there any questions that you
17 want to ask?

18 MR. BAKER: No.

19 THE COURT: Are you in fact guilty of what has
20 been--you have been charged with?

21 MR. BAKER: Yes.

22 THE COURT: Do you have a statement, Mr.
23 Gravis, of what the--

24 MR. GRAVIS: Yes, your Honor.

25 THE COURT: Thank you. I have in front of me,

1 (July 29, 1992, Sentence)

2
3 THE COURT: The State of Utah vs. Kerry Baker
4 for sentencing.

5 MR. GRAVIS: Your Honor, may we pass that? Mr
6 Baker's attorney is Mr. Allen. He indicates to me that
7 he wants Mr. Allen here. I left a message. I will try
8 to get Mr. Allen over, unless he is willing to do it
9 without Mr Allen.

10 THE COURT: Thank you. Do you want to wait for
11 Mr. Allen?

12 MR. BAKER: I can get it over with now.

13 THE COURT: Have you had a chance to review it?

14 MR. GRAVIS: I have, your Honor. Kerry, step
15 on down here.

16 THE COURT: This is the time set for sentencing
17 in this matter. Is there any legal reason that sentence
18 should not be imposed?

19 MR. GRAVIS: No, your Honor.

20 THE COURT: Mr. Daines, would the State like to
21 be heard in this matter?

22 MR. DAINES: No, your Honor.

23 THE COURT: I have received--requested and now
24 received a recommendation from the Department of
25 Corrections. I think, Mr. Gravis, you have received a

1 copy of that. Have you had a chance to review that and
2 review the matter with Mr. Baker?

3 MR. GRAVIS: Yes, your Honor, I have.

4 THE COURT: Is there anything you would like to
5 say now before I impose sentence?

6 MR. GRAVIS: No, your Honor. Of course it is
7 not a very good recommendation. He does have a--he has
8 been to prison before. And I think Mr. Jones--Mr. Baker
9 has some problems that might be addressed by a
10 diagnostic evaluation. Otherwise, he is just going to
11 keep repeating as an offender. Maybe there is something
12 that can be done other than sending him to prison.

13 THE COURT: Thank you. Mr. Baker, is there
14 anything you want to tell me?

15 MR. BAKER: Well, Bernie Allen promised me one
16 thing, he told me I ain't going to prison. And he would
17 try to get me a work release and do some jail time. If
18 I do--well, go to prison or a lot of jail time, I ain't
19 paying no restitution, you know. I did time for it.

20 THE COURT: Thank you, Mr. Baker. This is
21 a--the facts in this situation are normally not those
22 that would bring about a recommendation and imposition
23 of prison. However, Mr. Baker, as I look over your past
24 history, it is filled with violations. You have been to
25 prison. You have been in and out. I think the staff of

1 the Department of Corrections, that this is the kind of
2 a case where there is nothing left to do. You have been
3 placed in about every program there is. You have been
4 through those programs, most of them unsuccessful. You
5 are in a situation now as you violate the law you are
6 just going to spend time. There is no other program.

7 If you want to get down to the prison and attempt to
8 put yourself in programs that are going to help you,
9 your rehabilitation now, I think it is up to you. I
10 don't think anybody--

11 MR. BAKER: I have been there before, your
12 Honor. No programs in prison, no programs at all.

13 THE COURT: I think there are others that come
14 out and say that's not correct. But no one is going to
15 force you to do that. But I am going to tell you that
16 you are now in a situation where you are going to
17 prison. When you get out of prison, if you violate the
18 law, you are going to go back. The days of trying to do
19 something else are over.

20 The Court is imposing--sentencing you to spend zero
21 to five years in the Utah State Prison. I am also
22 ordering that you pay restitution.

23 MR. BAKER: I won't pay no restitution.

24 THE COURT: Thank you. Of \$641.14.

25 MR. BAKER: I won't pay it.